No. 20,872

IN THE

United States Court of Appeals

For the Ninth Circuit

ARISTA CIA. DEVAPORES, S.A.,
Appellant,

vs.

HOWARD TERMINAL,
Appellee.

BRIEF FOR APPELLANT

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JURISDICTION

Jurisdiction of this Court exists, by virture of 28 U.S.C. § 1291 and a Notice of Appeal (R. 83), filed January 27, 1966, from a Judgment (R. 78) in admiralty entered in the United States District Court for the Northern District of California on November 8, 1965.

The District Court had jurisdiction, under 28 U.S.C. § 1333, by virtue of a longshoreman's libel against Appellant for an injury incurred on Appellant's vessel on navigable waters and an impleading petition filed by Appellant against Appellee seeking indemnity under a stevedoring contract (Stipulation, R. 65).

STATEMENT OF THE CASE

This case was commenced in the Court below by a longshoreman's Libel to recover from Appellant shipowner for injuries suffered while working aboard Appellant's vessel, the SS WORLD LEADER. The vessel owner impleaded the longshoreman's employer, Howard Terminal, seeking indemnity for the expense to which it was put by reason of the longshoreman's action. The longshoreman's claim was resisted by the shipowner and prepared for trial and, when the case was called for trial, the longshoreman voluntarily dismissed his Libel, leaving before the Court only the claim presented in the Impleading Petition to recover the expense of the shipowner's successful defense.

The case was submitted to the Court below on a Stipulation of facts (R. 65) as follows:

> "1. The vessel, SS WORLD LEADER, a Liberty type vessel, was owned and operated by ARISTA CIA. DeVAPORES, hereinafter referred to as 'Owner';
>
> "2. HOWARD TERMINAL, a corporation, hereinafter referred to as 'Howard' is an expert stevedoring contractor, well experienced in the loading of scrap metal in vessels;
>
> "3. On May 1, 1962, Howard was conducting stevedoring operations on the vessel, loading scrap metal into the No. 5 hold;
>
> "4. Howard was performing its stevedoring services in accordance with a standard oral contract for such services;
>
> "5. COESCO LOCKETT was employed as a longshoreman by Howard in this operation;

"6. At about 10:00 A.M. on May 1, 1962, Lockett, while walking backward over the deck of the vessel, tripped over a steam pipe guard, which is a standard part of the structure of all Liberty type vessels (a photograph of the area is attached [to the Stipulation, at R. 68] as Exhibit 'A');

"7. The Owner was not negligent in causing Lockett's accident;

"8. The vessel was seaworthy in all respects with reference to Lockett's accident;

"9. Lockett was negligent in causing his own accident, and his negligence was the sole proximate cause of his accident;

"10. On April 15, 1963, Lockett filed a Libel in Admiralty against the Owner, seeking damages from the Owner because of certain negligence and unseaworthiness alleged therein;

"11. It was reasonable and necessary for the vessel to defend itself against the Libel filed by Lockett up to the moment that Lockett's Proctor moved the Court that the case be dismissed;

"12. The Owner incurred certain reasonable and necessary Proctors' fees and expenses in defending the Owner against the Libel filed by Lockett, the exact amount of which is yet to be determined, and will be the subject of a further hearing by the Court, if not hereafter stipulated by the parties;"

Despite the stipulation that an employee of the stevedore (the libelant himself) had been negligent in causing Libelant's injuries, the District Court decided, in a Memorandum Opinion and Judgment (R. 78), that the stevedore did not breach its warranty of safe and proper

performance and that the vessel owner was therefore not entitled to recover its damages. The District Court reached this result by testing breach of contract not as of the time of negligent performance aboard the vessel but as of the time of the unmeritorious suit ("In order to recover over the costs of the legal defense, the Shipowner must prove that the Stevedore breached his warranty of workmanlike service when his employee brought the unmeritorious personal injury suit." Memorandum Opinion, at R. 79). The Court supported its decision with a policy argument that the filing of such a suit should not be discouraged (R. 82).

This appeal presents the question whether carelessness on the part of a stevedore's employee ceases to be a breach of the stevedore's warranty of safe and proper performance because it results in injury to the careless employee, rather than to another, and whether the shipowner is barred, on account of that distinction, from recovering the damages which it incurs because of the resulting longshoreman's injury suit.

SPECIFICATIONS OF ERROR

The following errors are relied upon by Appellant:

1. The District Court erred in holding that the negligence of Libelant, the Appellee's employee, was not a breach of Appellee's warranty of safe, proper and workmanlike performance.

2. The District Court erred in holding that Appellant was not entitled to recover from Appellee the expenses

of Appellant's successful defense of an action brought against it by Appellee's employee, resulting from negligence in the performance of Appellee's stevedoring contract with Appellant.

SUMMARY OF ARGUMENT

It is settled doctrine that stevedore contractors are liable, under their warranties of safe and proper performance, to reimburse shipowners for the expenses of the longshoremen's injury suits which arise from their negligent performance, not only where the shipowner has had to pay damages to the longshoremen, but also where he has not done so, as when the stevedore contractor secures the dismissal of the suit or the shipowner successfully defends against it.

In denying indemnity here on the ground that there had been no breach of warranty, the Court below mistakenly tested for breach of warranty at the time of suit, rather than the time of performance of the contract, misconstrued contrary decisions in other Circuits and based its decision upon a policy argument against discouraging longshoremen's suits which had been rejected by the Supreme Court in its application to meritorious claims and is applied here only to encourage unmeritorious ones.

The decided cases show a clearly established rule of allowing the recovery of defense expenses from the stevedore whether the injury results from unseaworthiness which the longshoreman alone has created or simply from his own inattention to his own safety or from the negli-

gence of one or more of his fellow employees and whether or not the case is successfully defended, as this rule imposes the expense upon the party best able to promote safety and prevent the injury and encourages the effective defense of such suits by the shipowner. The disallowance of indemnity in the present case would be contrary to the prevailing views in other Circuits and create an anomalous exception to the rule, unsupported by policy.

The Supreme Court has stated the policy in these cases to be that the burden should fall upon the stevedore, who is best situated to encourage safety on the part of longshoremen. The rule announced by the Court below would put a premium on losing lawsuits by placing the shipowner in a worse position from defending effectively, than he would be in, if he settled or suffered the judgment to go against him. The policy argument that the allowance of indemnity might result in discouraging the bringing of suits such as this was rejected by the Supreme Court in its application to meritorious claims. The implication of such an argument in the present case is that unmeritorious claims are to be encouraged where meritorious ones may be discouraged. Such is not the policy of the law.

ARGUMENT

I. THE CARELESSNESS OF A STEVEDORE'S EMPLOYEE WHICH CAUSES AN INJURY IS A BREACH OF THE STEVEDORE'S WARRANTY OF SAFE AND PROPER PERFORMANCE WHICH ORDINARILY GIVES RISE TO A DUTY OF THE STEVEDORE TO RESPOND IN DAMAGES FOR THE EXPENSE TO WHICH THE SHIPOWNER IS PUT BY THE RESULTING LAWSUIT.

Since the decision in *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 1946 A.M.C. 698, it has become the rule rather than the exception that a longshoreman's injury results in a claim against the shipowner.[1] In *Ryan Stevedoring Co. Inc. v. Pan-Atlantic Steamship Corporation,* 350 U.S. 124, 1956 A.M.C. 9, under the growing pressure of such longshoremen's claims, it was held to be an implied term of a stevedore contract that the stevedore would perform safely, properly and in a workmanlike manner and was obliged to pay as damages the expenses incurred by the shipowner as the result of such suits arising from a breach of the warranty. There is such a breach, of course, whenever the longshoremen employed by the stevedore fail to exercise proper care for their own and each other's safety, as when they fail to look where they are going or choose an unsafe route instead of a safe one. *Nicroli v. Den Norske Afrika, etc.,* 332 F.2d

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[1]"Indeed, in an action by one injured aboard a vessel, whether in or out of navigation, it is difficult to conceive of any situation wherein there would not be some *potential* liability upon the shipowner if the injured party was engaged in the performance of any work connected with the vessel." *Bielawski v. American Export Lines v. Norfolk Shipbuilding & Drydock Corporation,* 220 F. Supp. 265, 270, 1964 A.M.C. 984, 991 (E.D. Va. 1963) aff'd *sub nom. American Export Lines v. Norfolk Shipbuilding & Drydock Corporation,* 336 F.2d 525, 1965 A.M.C. 167 (4th Cir. 1964).

651, 1964 A.M.C. 1413 (2d Cir.); *Mortensen v. A/S Glittre,* 348 F.2d 383, 1965 A.M.C. 2016 (2d Cir.); *Lusich v. Bloomfield Steamship Company,* 355 F.2d 770, 1966 A.M.C. 191 (5th Cir.).

The damages recoverable by the shipowner from the stevedore under the *Ryan* warranty include not only the amount paid to the injured longshoreman but also the shipowner's attorneys' fees and other expenses in defending against the longshoreman's claim. *Matson Terminals, Inc. v. Caldwell and Sea-Land Service, Inc.,* 354 F.2d 681, 1966 A.M.C. 624 (9th Cir. 1965). This is true not only when the longshoreman's claim proceeds to judgment but also when it is settled by the shipowner. *Shannon v. United States,* 235 F.2d 457, 1956 A.M.C. 2281 (2d Cir.); *Damanti v. A/S Inger,* 314 F.2d 395, 1963 A.M.C. 852 (2d Cir.). Moreover, it is well established that, when a breach of warranty has led to an injury suit against the shipowner, the owner is entitled to recover the fees and expenses for its defense from the stevedore, even though it has not been required to pay anything by way of damages to the longshoreman. This is the case where the longshoreman agrees with the stevedore to withdraw his claim against the shipowner, as in *Paliaga v. Luckenbach Steamship Company,* 301 F.2d 403, 1962 A.M.C. 1632 (2d Cir. 1961) and *Rederi A/B Dalen v. Maher,* 303 F.2d 565, 1962 A.M.C. 1944 (4th Cir.). And it is so where the shipowner is successful in defeating the longshoreman's claim at trial. *Massa v. C. A. Venezuelan Navigacion,* 332 F.2d 779, 1964 A.M.C. 1375 (2d Cir.); *Guarracino v. Luckenbach Steamship Company,* 333 F.2d 646, 1964 A.M.C. 2240 (2d Cir.); *Ellerman Lines v. Atlan-*

tic and Gulf Stevedores, Inc., 339 F.2d 673, 1965 A.M.C. 283 (3d Cir. 1964); *American Export Lines v. Norfolk Shipbuilding & Drydock Corporation,* 336 F.2d 525, 1965 A.M.C. 167 (4th Cir. 1964); *Strachan Shipping Co. v. K.N.S.M.,* 324 F.2d 746, 1964 A.M.C. 3 (5th Cir. 1963).

The imposition of liability upon the stevedore in all these cases falls within the policy stated by the Supreme Court, in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company,* 376 U.S. 315, 324, 1964 A.M.C. 1075, 1082, that "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

II. THE FACT THAT THE SHIPOWNER SUCCEEDS IN DEFENDING THE CASE BY ESTABLISHING THAT THE LONGSHOREMAN WAS INJURED THROUGH HIS OWN NEGLIGENCE IS NO REASON FOR DEPARTING FROM THE RULE AND DENYING RECOVERY OF THE EXPENSES OF DEFENSE.

A. The Decision Below

In the present case the shipowner successfully defended the longshoreman's injury claim to the point of securing a voluntary dismissal at the opening of trial. Although the longshoreman claimed otherwise, it was agreed, as between the shipowner and stevedore, for the purposes of this indemnity claim, that the vessel was seaworthy and her owners not negligent and that the plaintiff's own negligence was the cause of his injury (Stipulation, R. 65, 66). In denying recovery of indemnity for the admitted negligence of the stevedore's employee, the Court

below mistakenly tested for breach of warranty by looking for it at the time suit was brought rather than when the stevedoring was performed, ignored and misconstrued prior Court decisions and based its decision upon a statement of policy which had already been rejected by the Supreme Court of the United States.

The Court below got off course early in its Memorandum Opinion and Judgment (R. 78, at 79) when it said, "In order to recover over the costs of the legal defense, the Shipowner must prove that the Stevedore breached his warranty of workmanlike service when his employee brought the unmeritorious personal injury suit. *Massa v. C. A. Venezuelan Navigacion . . .*" A reference to any of the other indemnity cases cited in this brief will show that the test applied for workmanlike service has nothing to do with the time when suit is brought but depends upon proper performance when, and only when, the stevedoring operations aboard ship are underway. The case of *Massa v. C. A. Venezuelan Navigacion,* 332 F.2d 779, 1964 A.M.C. 1375 (2d Cir.) not only gives no support for the proposition for which it was cited, but stands in direct conflict with the ruling of the Court below.

With respect to holdings outside this Circuit, the Court below had this to say: "The courts outside the Circuit which have touched the specific question of reimbursement of attorney's fees in an unsuccessful lawsuit against the shipowner, have done so mainly by way of dictum." (R. 80). The Court goes on to mention two of the cases, the *Strachan* case and the *Guarracino* case, which involved this problem. In fact, the Courts of Appeals in the Second, Third, Fourth and Fifth Circuits have all dealt

directly with the question referred to and have held the shipowner entitled to recover, in terms which were by no means dicta. *Massa v. C. A. Venezuelan Navigacion,* 332 F.2d 779, 1964 A.M.C. 1375 (2d Cir.); *Guarracino v. Luckenbach Steamship Company,* 333 F.2d 646, 1964 A.M.C. 2240 (2d Cir.); *Ellerman Lines v. Atlantic and Gulf Stevedores, Inc.,* 339 F.2d 673, 1965 A.M.C. 283 (3d Cir. 1964); *American Export Lines v. Norfolk Shipbuilding & Drydock Corporation,* 336 F.2d 525, 1965 A.M.C. 167 (4th Cir. 1964); *Strachan Shipping Co. v. K.N.S.M.,* 324 F.2d 746, 1964 A.M.C. 3 (5th Cir. 1963).

The Court below appeared to see a distinction between this case and "situations in which there was either unseaworthiness on the part of the vessel . . . negligence on the part of a fellow employee, or a lack of supervision by the Stevedore company." (R. 80). The Court recognized, moreover, that if the negligence of the longshoreman had resulted in breaking a piece of ship's gear, as well as injuring himself, the warranty would be breached (R. 81).

Laying great stress on the fact that the longshoreman's claim has been found to lack merit, the Court went on to state that "the Shipowner (like all other property owners) must accept the burden of defending himself against unmeritorious claims of workman [sic] invited on his premises and cannot look to the stevedore for reimbursement." (R. 82). This is the "cost of doing business" argument of which one court said: "Patently, this is not a *reason* for denying recovery of the costs of litigation over against the third party defendant stevedore; this is no more than the restatement of the courts' conclusion

denying recovery". *Caswell v. K.N.S.M.,* 205 F.Supp. 295, 297, 1962 A.M.C. 2126, 2128 (S.D. Tex.) aff'd *sub nom. Strachan Shipping Co. v. K.N.S.M.,* 324 F.2d 746, 1964 A.M.C. 3 (5th Cir. 1963).

Finally, the Court below puts forth the policy argument that "If the court were to decide otherwise, undue pressure might be put on longshoremen by their employers to accept compensation rather than sue the shipowner and run the risk of incurring legal defense fees which the Stevedore company or Contractor would ultimately have to pay". (R. 82). Precisely this argument was stated by the dissenters in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation,* 350 U.S. 124, 144, 1956 A.M.C. 9, 25, and was much more appropriate in the *Ryan* case, where it was rejected in its application to meritorious suits, than here, where it is accepted in its application to those which are unmeritorious.

B. The Decided Cases

The stevedore is held for damages on its warranty where the injury was caused by unseaworthiness which the injured longshoreman himself alone created, as in *Holley v. The Manfred Stansfield,* 186 F.Supp. 212, 1960 A.M.C. 1956 (E.D. Va.), or knowingly allowed to continue, as in *Mortensen v. A/S Glittre,* 348 F.2d 383, 1965 A.M.C. 2016 (2d Cir.). Likewise, by simple carelessness and inattention to his own safety, apart from the creation of any condition of unseaworthiness, the longshoreman breaches the stevedore-employer's warranty and subjects the stevedore to damages. *Nicroli v. Den Norske Afrika, etc.,* 332 F.2d 651, 1964 A.M.C. 1413 (2d Cir.); *Lusich v.*

Bloomfield Steamship Company, 355 F.2d 770, 1966 A.M.C. 191 (5th Cir.).[2] In the *Nicroli* case the court said:

> "Moreover the plaintiff's own negligence in failing to watch where he was going and in taking an unsafe route when he knew that a safe route was available would be sufficient to charge the stevedore with breach of its warranty of workmanlike service." 332 F.2d at 656, 1964 A.M.C. at 1420.

The negligence of the plaintiff operates with the same effect, and surely with even greater reason, in the cases where it is used as the basis of a successful defense by the shipowner. Of the cases of successful defense which we have already cited,[3] the three which we next refer to involve that very problem.

In *Damanti v. A/S Inger,* 314 F.2d 395, 1963 A.M.C. 852 (2d Cir.), the longshoreman's claim was settled by the

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[2]There is an obscure reference in the District Court's opinion (Footnote 1, at R. 81) to *Drewery v. Daspit Bros. Marine Divers, Inc.,* 317 F.2d 425, 1963 A.M.C. 1787 (5th Cir.), where the injured man's own negligence was held not to impose liability upon his employer. In the *Lusich* case, cited in the text above, the same court distinguished the *Drewery* case as involving the construction of a particular written contract provision.

[3]In addition to the *Damanti, Massa* and *Guarracino* cases discussed in the text at this point, *Ellerman Lines v. Atlantic & Gulf Stevedores, Inc.,* 339 F.2d 673, 1965 A.M.C. 283 (3rd Cir. 1964); *American Export Lines v. Norfolk Shipbuilding & Drydock Corporation,* 336 F.2d 525, 1965 A.M.C. 167 (4th Cir. 1964) and *Strachan Shipping Co. v. K.N.S.M.,* 324 F.2d 726, 1964 A.M.C. 3 (5th Cir. 1963), also cases in which indemnity was allowed for the expenses of successful defense, have already been cited. The *Ellerman* case arose on pleadings and the holding with respect to the recoverability of successful defense expenses is unqualified. In the *American Export Lines* case the sole proximate cause of the accident was the negligence of plaintiff's co-employee. In the *Strachan* case there was unspecified stevedore negligence.

shipowner prior to judgment and the indemnity claim was submitted to a jury on special interrogatories. The jury found that there had been no unseaworthiness of the vessel or negligence of her owners (and hence no vessel liability) and that the injury was caused by stevedore negligence only but that the shipowner had acted reasonably in settling the case. Based upon that verdict the District Court denied recovery of the defense expenses. The Court of Appeals, in reversing, stated:

> "It is probable that the negligence of the stevedore . . . was based solely on the actions of the injured longshoreman. This, however, does not preclude recovery over by the shipowner, but is simply a factor that would reduce the recovery of the injured plaintiff from him. . . . and thus is to be considered only in determining the reasonableness of the settlement." 314 F.2d at 399, 1963 A.M.C. at 857.

In *Massa v. C. A. Venezuelan Navigacion,* 332 F.2d 779, 1964 A.M.C. 1375 (2d Cir.), the vessel was found seaworthy and her owner free of negligence and the accident was found to have been caused by the negligence of the plaintiff himself and a fellow longshoreman, in the manner in which they jointly connected their lifting equipment to a pallet board. Although the only negligence was that of the plaintiff or other negligence precisely like it, and the suit was therefore successfully defended as unmeritorious, indemnity for the expenses of defense was granted. In discussing the unmeritorious character of the suit, the Court stressed that whenever the stevedore has caused "potential loss to the shipowner by rendering it likely to suit, the stevedore has breached its

warranty . . .'' 332 F.2d at 782, 1964 A.M.C. at 1379, and went on to say:

> ''[W]e see no good reason for forcing the shipowner to bear the expenses of successfully defending the suit when the stevedore would have to bear the shipowner's expenses of unsuccessfully defending the suit. Such a rule would place a premium on losing law suits.'' 332 F.2d at 782, 1964 A.M.C. at 1379.

The Court pointed out that:

> ''The burden is best placed on the stevedore who can minimize expense and injury by insisting on greater safety precautions.'' 332 F.2d at 782, 1964 A.M.C. at 1380.

In *Guarracino v. Luckenbach Steamship Co.,* 333 F.2d 646, 1964 A.M.C. 2240 (2d Cir.), there was likewise found no unseaworthiness or vessel negligence. The accident was found to be due solely to the injured man's having attempted to climb out of a hold on some cartons without waiting for a portable ladder and to the failure of the hatch boss to stand guard and prevent the plaintiff from climbing up until the ladder was brought. The Court of Appeals stressed that the warranty had been breached, and liability thus imposed, in two separate respects, one of which was the injured man's own negligence, saying:

> ''While the shipowner has been successful in defense of the main action, he has suffered loss, in the form of attorney's fees and expenses in the defense, caused by the actions of the stevedore's employees in two respects which we hold were in breach of the stevedore's warranty of workmanlike service. These are the abandonment of his post by the hatch boss in the

> face of his general instructions to stay at a hatch until a ladder was brought, and the action of libelant, when a safe alternative was available, in taking a way out likely to cause injury to himself and his fellow worker.'' 333 F.2d at 648, 1964 A.M.C. at 2242.

Again the Court of Appeals pointed out the sound policy of this result, saying:

> ''This is as it should be, for it is the stevedore, in direct control of the hatch boss and the worker, who can best avoid the injury and expense by insistence on observance of safety precautions.'' 333 F.2d at 648, 1964 A.M.C. at 2243.

If the longshoreman, in falling, had not only injured himself but damaged a piece of ship's gear, it appears that the Court below would agree that the warranty was breached (R. 81). Likewise it appears that if the sole negligence of one longshoreman had injured another longshoreman, as in *American Export Lines v. Norfolk Shipbuilding & Drydock Corporation,* 336 F.2d 525, 1965 A.M.C. 167 (4th Cir. 1964), or the joint negligence of two longshoremen had combined to injure one of them, as in *Massa v. C. A. Venezuelan Navigacion,* 332 F.2d 779, 1964 A.M.C. (2d Cir.), there would be no issue presented here as to the existence of a breach of warranty.

In summary, if Lockett, the longshoreman, in falling, had done property damage, it would have to be paid for by the stevedore; if he had struck another longshoreman and caused him to fall at the same time, the expenses of defending that other longshoreman's lawsuit would have to be paid by the stevedore; and if another longshoreman

had asked Lockett to step backward, with the result that Lockett fell as he did so, the stevedore likewise would have to pay the expenses of defending Lockett's suit in the present case.

Under the authorities such a suit as this could be settled by the shipowner with the longshoreman, for a reasonable figure, and the settlement money as well as expenses could clearly be recovered over from the stevedore, as in *Damanti v. A/S Inger,* 314 F.2d 395, 1963 A.M.C. 852 (2d Cir.). It is scarcely in the interest of stevedores to promote such a settlement in lieu of a completely effective defense. It seems anomalous, indeed, that indemnity should be denied in the single situation in which the most complete and effective defense is made by the shipowner.

C. Policy Considerations

The Supreme Court has stated the policy in this class of case to be "that liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company,* 376 U.S. 315, 324, 1964 A.M.C. 1075, 1082. It is the stevedore which is best situated to encourage safety on the part of longshoremen when they injure themselves, as well as when they injure others, and the decision of the Court below was therefore contrary to the established policy.

As the Courts of other Circuits have pointed out, in cases which we have already quoted, the rule announced by the Court below would put a premium on losing lawsuits and discourage the shipowner from incurring the

expense to make the best defense available to the longshoreman's claim. It can scarcely be the policy of the law to make a lackadaisical or sham defense profitable where liability does not exist and to turn a lawsuit into a partially fictional proceeding in which the actual interest of one of the parties is contrary to the role it plays in court.

As for the policy argument of the Court below that the allowance of indemnity might result in discouraging the bringing of such suits as this, that argument was set forth with great fervor in the dissent in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation,* 350 U.S. 124, 144, 1956 A.M.C. 9, 25, and rejected by the Court. On the basis of the rule announced by the Court in the *Ryan* case, the *Ryan* dissenters foretold the end of longshoremen's third party suits against vessels. This Court can evaluate that prediction in the light of its own experience. While the threat of indemnity may be allowed to exert whatever discouraging influence it has upon meritorious claims of every sort, the policy now announced by the Court below in the present case is that unmeritorious claims, and unmeritorious claims alone, are not to be so discouraged. The proposition that sound legal policy does not encourage the filing of unmeritorious claims requires, we trust, no citation nor argument.

CONCLUSION

For the foregoing reasons we submit that the Judgment of the District Court should be reversed with directions to enter a judgment in favor of Appellant for the amount of its expenses in the successful defense of the Libelant's case.

Dated, San Francisco, California,
September 22, 1966.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GRAYDON S. STARING,
Of Attorneys for Appellant.